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NO. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1987

RICHARD L. DUGGER,

Petitioner,

v.

JAMES C. AGAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

WHETHER CERTIORARI SHOULD BE GRANTED TO REVIEW AN EXPRESS AND IRRECONCILABLE CONFLICT BETWEEN A DECISION OF THE ELEVENTH CIRCUIT AND DECISIONAL LAW FROM THE UNITED STATES SUPREME COURT.

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CASE NO. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1987

RICHARD L. DUGGER,

Petitioner,

v.

JAMES C. AGAN,

Respondent.

The Petitioner, Richard L. Dugger, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above titled proceeding on December 30, 1987, rehearing denied February 10, 1988.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at 835 F.2d 1337 (11th Cir. 1987).

The opinion of the United States District Court is contained in the Appendix to this petition at pages A-27 to A-71.

The opinions of the Florida Supreme Court relevant to this cause are reported at 503 So.2d 1254 (Fla. 1987) and 508 So.2d 11 (Fla. 1987), and are contained in the appendix at pages A-72 to A-88.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV of the Constitution of the United States provides, **inter alia**, that:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment X provides that:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

James Agan murdered Dana DeWitt while the two were serving prison sentences at the Florida State Prison.

Mr. Agan was serving a life sentence for a 1974 murder. In that case, Agan entered a guilty plea and later had his death sentence reduced to life on collateral attack. (Agan's competence to enter the 1974 plea was upheld, however).

Mr. Agan was confident that this murder case would also result in a life sentence (which in fact would be no sentence at all), if he entered a plea of guilty, as before, and later challenged his "competence", as before. Thus, Agan confessed to the authorities and to the grand jury. By letter (which is part of the record), he rejected the advice of his lawyer and specifically stated that he knew how he wanted the defense conducted.

Agan pled guilty and was sentenced to death. Agan was not impressed with the death sentence and told the prosecutor "I am still going to beat you".

According to plan, on collateral attack, Agan (an electronics technician by trade), suddenly declared himself a "low grand moron" who suffered from a myriad of mental illnesses and who, as a result, was entitled to relief.

Although Agan located a defense stable psychiatrist (Dr. Fox), to enter a last minute diagnosis of mental illness, "supported" by mental health records which were carefully and selectively quoted, Agan could not convince the state courts or the United States District Court that he was "incompetent" to plead. The reason for this was the record itself which showed:

(1) A lucid and competent grand jury

statement by Agan that showed he knew what he was doing and why he was doing it.

(2) A handwritten letter to counsel which was rational, coherent and well written (penmanship), reflecting no thought disorder, retardation or other illnesses. (R 1, 4, App. 15).

(3) Milledgeville Hospital records that showed that Agan, after being admitted as "psychotic", suddenly improved without medication, causing the doctors to label his admission an "error". (App. 36, 37).

(4) Agan's return to prison from Milledgeville Hospital showing him "fully restored". (App. 38).

(5) Florida State Prison records showing no mental health problems at all. (App. 20-2; 40-3, 15, 20, 127, 132).

(6) Prior appellate findings of competence to plead in his 1974 murder case.

(7) Military records showing Agan was a poor recruit but not mentally ill in any way.

Agan was simply one of those people who avoided military service and unpleasant prison assignments by feigning illness and sitting in hospitals.

After relief was properly denied by the United States District Court pursuant to Rule 8 of the Rules Governing §2254 Cases, Agan appealed to the Eleventh Circuit, challenging his own competence and the "effectiveness" of the attorneys whom he had preempted.

On the competency issue, the Eleventh Circuit looked at Agan's allegations and portions of his medical records and decided to order a full evidentiary hearing to facilitate its **de novo** weighing of the evidence. The court not only failed to discern "clear error", it specifically

noted that the district court "may well be correct" in its judgment.

On the issue of ineffective assistance of counsel, the court again noted the total preemption of counsel and the record support for the district court's decision, but once again wanted a hearing to satisfy its own desire for **de novo** factual review. No finding of clear error was made on this point as well.

Finally, the Eleventh Circuit "concluded" by chiding the State of Florida for not granting (3.850) evidentiary hearings which would "simplify" federal §2254 review.

The petition at bar sought rehearing, without success. This action ensued.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED DUE TO EXPRESS AND IRRECONCILABLE CONFLICT BETWEEN THE DECISION AT BAR AND DECISIONS OF THIS COURT IN **MARSHALL V. LONBERGER, ANDERSON V. BESSEMER CITY, BLACKLEDGE V. ALLISON,** AND **SMITH V. PHILLIPS.**

The Eleventh Circuit, in apparent disregard of the decisional law of this Court and the will of Congress, has declared itself the trier of fact in capital habeas cases and has promulgated its own rules for granting automatic evidentiary hearings. If the State of Florida is to continue to be bound by 28 U.S.C. §2254 or stays of execution attendant thereto, the issue of supremacy must be resolved. Either Florida, as a state, shall be governed by acts of Congress and the decisional law of this Court or it will be ruled by judicial fiat from the Eleventh Circuit. We cannot serve two masters.

Three points of error stand out from the decision at bar:

(A) The Eleventh Circuit refused the State's request to apply the standard of review required by **Marshall v. Lonberger,** 459 U.S. 422 (1982), and **Anderson v. Bessemer City,** 470 U.S. 564 (1985).

(B) The Eleventh Circuit announced its own rule governing the grant of evidentiary hearings in §2254 cases, "repealing" by judicial fiat §2254(d) and Rule 8 of the Rules Governing §2254 Cases.

(C) The Court chastised the State of Florida for not granting Agan an evidentiary hearing in state court so as to facilitate federal review.

These three holdings expressly conflict with a number of decisions by this Court, the intent of Congress and the Constitution of the United States. The decision, which

forces the state into yet another frivolous and costly evidentiary hearing, presents Florida with an injury that is "capable of repetition yet evading review". **Gerstein v. Pugh,** 420 U.S. 103 (1975).[1] Each holding shall be addressed individually.

(A) Standard of Review

The Eleventh Circuit rejects this Court's decisions in **Marshall v. Lonberger, supra,** and **Anderson v. Bessemer City, supra,** which call for adherence to Fla.R.Civ.P. 52(a).

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[1] See **Bundy v. Dugger,** Case No. 87-97, Oct. Term 1986. After an expensive evidentiary hearing in District Court, Bundy's petition was denied as an "exercise in sophistry" and the District Court reaffirmed its earlier decision. On second review of the Eleventh Circuit, virtually nothing of consequence in the way of evidence could be argued by Bundy (the court has yet to rule). Florida was stuck with the expense of this frivolous hearing.

In the decision at bar, no "clear error" was found, nor was that standard of review even discussed. Instead, the Circuit Court flatly agreed that the District Court's findings were supported by the record and "could well be correct". Why, then, did the Court reverse? Because it wanted "additional evidence" from which it could conduct **de novo** review on appeal.

In **Marshall v. Lonberger, supra,** at 434, this Court rejected the (Eleventh Circuit's) approach, stating:

> The Court of Appeals' reliance upon respondents testimony, discussed above, and the fact that "the state produced no contrary evidence" is quite wide of the mark for purposes of deciding whether factual findings are fairly supported by the record. Title 28 U.S.C. §2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the trial court and not by them.

Agan's credibility and competence was assessed by the trial court judge who conducted his **Boykin**[2] inquiry prior to accepting his plea and who denied Agan's collateral (Fla.R.Crim.P. 3.850) attack on his competence to plead. The state court judge's determination was supported by adjudications of Agan's competence to plead in a preceding murder case and medical records that showed that Agan was either "fully restored" or flatly faking so-called mental illness. A **nunc pro tunc** competency hearing by the United States District Court was not required. **Blackledge v. Allison,** 431 U.S. 63 (1977); **Sumner v. Mata,** 455 U.S. 591 (1982); §2254(d) nor was the state court judge obliged to appear as a witness

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[2] **Boykin v. Alabama,** 393 U.S. 238 (1969).

in federal district court to justify his finding of competence.[3]

In **Anderson v. Bessemer City, supra,** at 574, this Court, in addition to recognizing **Marshall, supra,** held:

> This is so even though the District Court's findings do not rely on credibility determinations but are based instead on physical or documentary evidence or inferences from other facts.

The District Court did not hold a hearing on the issue of Agan's competence. It had his sworn grand jury testimony, his **Boykin** transcripts, his letter to counsel on case strategy, a prior adjudication of competence to plead guilty

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[3] In **Bundy,** this was the very result of this Court's denial of certiorari. We submit that the interests of comity preclude forcing state judges to appear before federal magistrates or judges to justify old rulings.

and hospital records showing Agan to be a faker or at least "fully restored" (all antedating his adjudication of competence). Again, full record support existed for the court's decision. On the "ineffective counsel" claim, the District Court had a complete record (and sworn testimony from Agan), showing that he had totally preempted counsel.

Why, therefore, do we need a hearing? We have hospital records showing Agan was a faker, do we need someone to read them aloud? We have hospital records describing Agan as fully restored. Do we need those read aloud as well? We have an adjudication of competence to plead. Do we need the judges to come in and swear to their orders? We have an admitted preemption of counsel. Do we need counsel to swear to it? If so, for what purpose? Even the Circuit Court's opinion concedes

that the District Court "may well be correct". Thus, in the absence of "clear error", why order a hearing?

Unfortunately, the answer lies in the fact that the Eleventh Circuit needs additional testimony to facilitate its own independent review of the evidence. We submit that the Eleventh Circuit is in error. Its function is not one of **de novo** review, its task is limited by Rule 52(a), **Marshall** and **Anderson** to a search for clear error. That is the holding of this Court in **Anderson:**

> To be sure, various Courts of Appeals have on occasion asserted the theory that an appellate court may exercise **de novo** review over findings not based on credibility determinations. [citations] This theory has an impressive genealogy, having first been articulated in an opinion written by Judge Frank and subscribed to by Justice Augustus Hand, see **Orvis v. Higgins, supra,** but it is impossible to trace the theory's lineage back to the text of Rule 52(a), which states that "findings

> of fact shall not be set aside unless clearly erroneous". That the Rule goes on to emphasize the special deference to be paid to credibility determinations does not alter its clear command. Rule 52(a) "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's finding unless clearly erroneous. **supra,** at 574.

The Eleventh Circuit can not reverse the United States District Court in the absence of a finding of clear error under Rule 52(a).

(B) Rejection of 28 U.S.C. §2254(d) and Rule 8 of the Rules Governing §2254 Cases.

The opinion below announced once again the Eleventh Circuit's own rule for compelling evidentiary hearings in every §2254 proceeding, regardless of the record. In repealing §2254(d) by judicial fiat, the Circuit Court said:

> An evidentiary hearing is necessary whenever a habeas petition alleges facts that, if true, establish his or her right to relief. The court must therefore accept all of petitioner's alleged facts as true and determine whether petitioner has set forth a valid claim.

That is the Eleventh Circuit's rule, but it is not the law.

This Court has already stated that there is no automatic entitlement to evidentiary hearings. **Blackledge v. Allison, supra.** Congress, in enacting 28 U.S.C. §2254(d), did **not** require federal district courts to swallow allegations on the face of a habeas petition "hook, line and sinker" and, based solely on said allegations, grant evidentiary hearings. Rather, the statute provides for district court reliance upon adequate state court records. In addition, Rule 8 of the Rules Governing §2254, states:

> (a) Determination by the court: If a petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.

Clearly the Eleventh Circuit's "take the claims as true and hold a hearing" standard does not comport with the "review the record and only hold a hearing if necessary."

If §2254 is binding on the State of Florida, our state can not be subjected to unique or **ad hoc** rules of procedure or standards of review that do not apply to the federal courts or the other states. **Smith v. Phillips,** 455 U.S. 209 (1982). **Davis v. Wyrick,** 766 F.2d 1197 (8th Cir. 1985); **Streetman v. Lynaugh,** 835 F.2d 1521,

1525 (5th Cir. 1988), **stay denied,** U.S. _____, 98 L.Ed.2d 634 (1988) and **Widgery v. United States,** 796 F.2d 223 (8th Cir. 1986) [addressing 28 U.S.C. §2255]. If Florida can not rely upon those portions of §2254 which protect it, then Florida is not bound by those portions of §2254 which allegedly "govern" it. We can not constitutionally by subjected to only "portions" of an act of Congress. If §2254(d) and Rule 8 correctly set forth the law and the procedure to be followed, we submit that this Court must exercise its regulatory authority and correct the Eleventh Circuit.

(C) Regulation of State "3.850" Proceedings.

Finally, Florida submits that its collateral proceedings under Fla.R.Crim.P. 3.850 are not constitutionally required, **Wainwright v. Torna,** 455 U.S. 586 (1982);

Pennsylvania v. Finley, 481 U.S. ____, 95 L.Ed.2d 539 (1987) and are therefore not subject to federal direction and control.

In a poorly concealed assertion of "superiority", the **Agan** court chided the Florida Supreme Court for failing to order an evidentiary hearing. The Circuit Court did not indicate that it would have accepted any state court findings of fact, see **Sumner v. Mata, supra,** but rather noted that "resolution in the state courts" would "simplify" federal review. We submit that Agan's competence has already been resolved in state court and so has the competence of his (preempted) counsel. Federal review, therefore, was already "simplified". What the Eleventh Circuit wants is for Florida to convert its "3.850" proceedings into a "first round" §2254 proceeding. The Circuit Court wants Florida to conduct evidentiary hearings regardless of its own

laws and it would reduce Florida judges to the role of federal magistrates.

This is an affront to the Tenth Amendment and calls into question the continuing constitutionality of §2254 as applied under the Tenth Amendment. See e.g., **Atlantic Coast Line Railroad v. Engineers,** 398 U.S. 281 (1970); **Parsons Steel v. First Alabama Bank,** 474 U.S. ____, 88 L.Ed.2d 877 (1986); **Louisville and Nashville Railroad v. Mottley,** 211 U.S. 149 (1908) cited in **Sumner v. Mata,** 455 U.S.

591 (1982).[4] The Eleventh Circuit can not direct Florida to amend its procedure under its own Rule 3.850, but certiorari is necessary to preserve Florida's rights in this regard since the Eleventh Circuit will not do so.

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[4] The Tenth Amendment ramifications of §2254 have not been litigated. **Sumner,** in citing to the **Louisville** case, recognizes the parallel between §2254 cases and federal anti-injunction act cases, which frequently confront the states' Tenth Amendment right to run their judicial systems without federal intrusion. Since §2254 "habeas" is not equivalent to constitutional "habeas" (**Wainwright v. Torna, supra; Pennsylvania v. Finley, supra**), the disparate impact of §2254 on Florida must be reviewed as a mere federal statute impacting upon a state. See **Peel v. Florida Department of Transportation,** 600 F.2d 1070 (5th Cir. 1981); **Fry v. United States,** 421 U.S. 542 (1975); **National League of Cities v. Usery,** 426 U.S. 833 (1976).

CONCLUSION

Certiorari must be granted due to the conflict between the decision of the Eleventh Circuit and decisions of this Court concerning the scope of appellate review and the operation of 28 U.S.C. §2254. Florida is being denied its fundamental right to have review in accordance with Rule 52(a) and this Court's decisions in **Marshall v. Lonberger, supra,** and **Anderson v. Bessemer City, supra.** In addition, Florida is being denied its right to rely upon Rule 8 of the Rules Governing §2254 and §2254(d) itself, thus denying to our state its constitutional right to equal protection under the law and its basic Tenth Amendment rights.

This Court has the supervisory power to bring the Eleventh Circuit into compliance

with your own decisions and the law as announced by Congress. We urge you to do so.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 87-3448

JAMES AGAN,

Petitioner-Appellant,

v.

RICHARD L. DUGGER,
ROBERT A. BUTTERWORTH,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion December 30, 1987, 11 Cir., 1987, ____F.2d____).

(February 5, 1988)

Before FAY, VANCE and ANDERSON, Circuit Judges.

PER CURIAM:

(XX) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on

the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Peter Fay
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 87-3448

JAMES AGAN,

Petitioner-Appellant,

v.

RICHARD L. DUGGER,
ROBERT BUTTERWORTH,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Florida

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(December 30, 1987)

Before FAY, VANCE and ANDERSON, Circuit Judges.

FAY, Circuit Judge:

Death row inmate James Agan appeals the denial of his petition for writ of habeas corpus. We find that there should have been an evidentiary hearing on Agan's claims of incompetence and of ineffectiveness of counsel, and we remand this case for a hearing on these issues.

THE NEED FOR AN EVIDENTIARY HEARING

Case law clearly establishes that

> [w]here the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court . . . [A] federal evidentiary hearing is required unless the state court trier of fact has after a full hearing reliably found the relevant facts.

Townsend v. Sain, 372 U.S. 293, 312-13 (1963) (footnote omitted); see Guice v. Fortenberry, 661 F.2d 496 (Former 5th Cir. 1981) (en banc).[1] In a case such as this, where there was no hearing, the federal court must decide whether the petitioner

should have received one. An evidentiary hearing is necessary whenever a habeas petition alleges facts that, if true, establish his or her right to relief. The court must therefore accept all of the petitioner's alleged facts as true and determine whether the petitioner has set forth a valid claim. See Porter v. Wainwright, 805 F.2d 930, 933 (11th Cir. 1986) cert. denied, 107 S.Ct. 3195, cert. denied, 107 S.Ct. 3196 (1987); Smith v. Wainwright, 777 F.2d 609, 615 (11th Cir. 1985), cert. denied, 106 S.Ct. 3275 (1986).

INCOMPETENCE

The test for determining competence to stand trial is "'whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him'". Dusky v.

United States, 362 U.S. 402, 402 (1960) (per curiam) (quoting the Solicitor General). Because the trial of a person who is incompetent would violate that individual's due process rights, Drope v. Missouri, 420 U.S. 162, 171-72 (1975), courts must conduct a hearing whenever there is a "bona fide doubt" regarding that defendant's competence. Pate v. Robinson, 383 U.S. 375, 385 (1966); see Adams v. Wainwright, 764 F.2d 1356, 1360 (11th Cir. 1985) (demanding "real, substantial, legitimate doubt as to [petitioner's] mental capacity"), cert. denied, 474 U.S. 1073 (1986); Strickland v. Francis, 738 F.2d 1542, 1543-44 (11th Cir. 1984). In this case, Agan points to both his highly irregular conduct during his grand jury and sentencing hearings and his long history of mental problems to support his incompetency claim. We find that the facts presented

clearly raise a bona fide doubt regarding Agan's competence to stand trial.

In September of 1980, Florida State Prison officials found Dana DeWitt, an inmate of the jail, dead in his jail cell. Following DeWitt's death, Agan, an inmate of the prison who was not a suspect in the case, confessed to the crime, re-confessed to a grand jury and to the sentencing judge, and waived all of his constitutional rights regarding this crime. He told the grand jury and the sentencing judge that he killed DeWitt because of a dispute that the two men had over money, that he had planned the murder for over two years, and that he regretted that DeWitt had not died a more painful death. He informed the grand jury and the sentencing judge that he was certain that, by confessing, he had almost guaranteed the receipt of a life sentence instead of a

death sentence, and further announced that once he returned to prison, he would find and murder DeWitt's "partner".[2] Agan's self-proclaimed strategy did not work; the judge, relying on statutory aggravating factors and also noting Agan's lack of remorse, sentenced Agan to death.

We do not find it surprising that Agan's conduct failed to endear him to the sentencing judge. Indeed, Agan's behavior, at a minimum, is bizarre and misguided and raises serious questions about Agan's reasoning ability. We need not decide whether this in itself raises a real doubt regarding Agan's competence, however, because Agan had a history of mental problems dating back to his youth. In the 1940's and the 1950's, the Army discharged Agan three times; a 1945 report cites Agan's mental deficiency and his instability as the reasons for the first

discharge. In 1953, Agan went to jail for robbery. Three prison psychiatrists concluded that Agan was psychotic. He therefore went to the state hospital where he received electric shock therapy. In 1974, after Agan's release from the hospital, a court in Tampa, Florida convicted Agan of murder.[3] Between 1974 and 1980, the year Agan confessed to DeWitt's murder, Agan continued to suffer from mental health problems. He tried to hang himself in 1975; in 1978, he asked to be locked up because he felt that he was going crazy. Clinical reports outline Agan's hallucinations and diagnose him as a schizophrenic. He received medication to control his problems.

The State argues that none of this raises any serious questions regarding Agan's competence. The State claims that because the state hospital released Agan,

he presumably has recovered from the psychosis from which he suffered at the time. The medication Agan received "controlled" his schizophrenia. Finally, the State asserts that Agan's Army record is too remote in time to be considered. Therefore, the State urges us to affirm the district court's holding that "[p]etitioner has not presented clear and convincing evidence to create a real, substantial, and legitimate doubt as to his mental competency to stand trial". Agan v. Dugger, No. 87-489-Civ-J-16 (M.D. Fla. filed June 24, 1987).

The State and the district court may in fact be correct that Agan was competent to stand trial. However, we cannot agree that Agan's evidence raises no serious doubts regarding his mental stability in 1980. The record on its face is inconclusive; but, Agan's allegations do raise an issue

regarding competency. An evidentiary hearing is essential in order to resolve this issue. Since no hearing was held in the state courts, such must be completed in the federal district court.

INEFFECTIVE ASSISTANCE OF COUNSEL

Agan also demands a hearing based on ineffective assistance of counsel. Ineffective assistance of counsel claims must satisfy a two-part test: "First, the defendant must show that counsel's performance was deficient . . . Second, the defendant must show that the deficient performance prejudiced the defense". Strickland v. Washington, 466 U.S. 668, 687 (1984); see Smith v. Wainwright, 777 F.2d 609, 616 (11th Cir. 1985), cert. denied, 106 S.Ct. 3275 (1986).

Two attorneys represented Agan during the pre-sentencing and sentencing period. First, John Stinson served as Agan's

lawyer. Due to personal difficulties between Stinson and Agan,[4] Stinson withdrew from this position. The court then appointed Mack Futch to represent Agan. Futch was Agan's attorney for both the plea and sentencing phases of the case.

The record indicates that neither attorney spent much time on Agan's case. Futch, who represented Agan at crucial phases of his case, apparently spent only 15.25 hours on the case.[5] He never spoke with Stinson to familiarize himself with Agan's case; he did no legal research; and he interviewed only one witness in addition to Agan and the State attorney and investigator. Futch did not even attempt to develop any defenses that might have helped his client. Most significantly, neither attorney requested a competency hearing. Both attorneys had access to Agan's "inmate jacket", which contained

Agan's medical record. Apparently, Futch actually examined this jacket. A review of Agan's long history of mental problems should have prompted Agan's attorneys to question Agan's competence. In addition, Agan's self-defeating behavior should also have alerted them to the possibility that Agan was incompetent to render his guilty plea.

Agan claims that the ineffectiveness of counsel prejudiced his case. He argues that he is innocent and that he pled guilty due to his incompetence and to the fear of violence at the hands of the actual killer. If his lawyers had investigated, he contends, they would have realized this and been able to develop an adequate defense. Agan also asserts that his attorneys did not counsel him properly regarding his guilty plea. Although they both advised Agan not to plead guilty,

neither fully explained the consequences to him. Had he understood the possible ramifications, he states, he would have behaved differently.[6] Finally, Agan claims that he should have been declared incompetent. Then, he would have been unable to plead guilty and receive the death sentence.

As the State correctly notes, there are many facts that could explain the conduct of Agan's lawyers. For example, Agan himself clearly wanted to plead guilty, and he apparently thwarted his attorney's efforts to stop him. He may also have prevented them from preparing a defense.[7] In addition, the lawyers may have made a strategic decision not to challenge Agan's competence, based on a reasonable determination that Agan was competent. None of this is clear from the record, however, and an evidentiary hearing will

have to be held to answer these questions as well. Since no hearing was held in the state courts, such must be completed in the federal district court.

OTHER ISSUES

Agan also raises several other issues. He argues that his incompetence and his lack of understanding concerning the potential consequences of his guilty plea render that plea ineffective. Agan contends that for the same reasons it is unconstitutional to rely on his confessions or his guilty plea to convict and sentence him. We feel that these arguments are subsumed by Agan's claims regarding competency and effectiveness of counsel. Agan's other allegations--concerning prosecutorial misconduct and the constitutionality of the sentencing proceeding--simply have no merit.

CONCLUSION

Because there was no hearing, the record before us is completely inadequate. We are, therefore, unable to effectively evaluate the claims raised by Agan. See Clark v. Blackburn, 619 F.2d 431, 434 (5th Cir. 1980) (per curiam). We can only determine that Agan's allegations, if true, would warrant relief; therefore, we remand for the evidentiary hearing he should have had long ago.

In conclusion, we acknowledge once again the relationship between federal and state courts. Congress and the United States Supreme Court have spelled out the obligations of each. In cases such as this one, where the need for a hearing is so clear, we are disappointed that the State prolongs the legal process by steadfastly refusing to recognize the obvious. We are also perplexed that the State would not

prefer to resolve these issues in the state courts thus simplifying any review by federal courts. See 28 U.S.C. §2254(d) (1982) (presumption of correctness). We are aware that when our court remands cases for evidentiary hearings the entire process becomes longer and more complicated. See, e.g., Slicker v. Wainwright, 809 F.2d 768 (11th Cir. 1987); McCoy v. Wainwright, 804 F.2d 1196 (11th Cir. 1986) (per curiam); Clark v. Blackburn, 619 F.2d 431 (5th Cir. 1980) (per curiam). These problems could be avoided if defendants alleging legally sufficient claims were granted timely hearings in the first instance.

Remanded for an evidentiary hearing.

FOOTNOTES

1. Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir. 1982) (en banc) makes this Former Fifth Circuit case binding on our circuit. See also Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc) (adopting Fifth Circuit decisions issued prior to October 1, 1981 as precedent in this circuit).

2. Agan stated that DeWitt's partner helped DeWitt steal $120 from him. Agan refused to reveal the identity of the partner.

3. Agan pled guilty to first degree murder in 1974 and received the death sentence. He was able to get the death sentence reduced on appeal. The State argues that, in this case, Agan pled guilty believing that this would guarantee the same result.

4. Agan, angry that Stinson advised him to abandon his plan to plead guilty, wrote Stinson a harshly critical letter.

5. This is the number of hours Futch claimed in his request for counsel fees.

6. The Supreme Court has held that the two-part test articulated in Strickland applies to cases challenging guilty pleas based on ineffectiveness of counsel. To show prejudice in these cases, the defendant must establish with "reasonable probability" that he or she would not have entered a guilty plea had counsel been effective. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); McCoy v. Wainwright, 804 F.2d 1196, 1198 (11th Cir. 1986) (per curiam).

7. Agan unquestionably stuck to his strategy despite opposition from his attorneys, and tried to prevent Futch from presenting mitigating evidence to the sentencing judge.

AGAN V. DUGGER

James C. AGAN, Petitioner-Appellant,

v.

Richard DUGGER, Secretary, Florida Department of Corrections, Robert L. Butterworth, Attorney General, Respondents-Appellees.

No. 87-3448

United States Court of Appeals, Eleventh Circuit.

June 25, 1987

After his conviction was affirmed by the Florida Supreme Court, 445 So.2d 326, state prisoner, under sentence of death, sought habeas corpus. The United States District Court for the Middle District of Florida, No. 87-489-Civ-J-16, John H. Moore, II, J., denied relief and prisoner sought certificate of probable cause and stay of execution. The Court of Appeals held that prisoner was entitled to evidentiary hearing on claim of ineffective assistance of counsel.

Motions granted.

Habeas Corpus 90.2(3)

State prisoner was entitled to hearing on claim of ineffective assistance of counsel based on allegations that counsel spent only 15 hours working on the case and that adequate investigation would have disclosed substantial exculpatory evidence, and would have shown his mental problems.

Appeal from the United States District Court for the Middle District of Florida.

Before FAY, VANCE and ANDERSON, Circuit Judges.

PER CURIAM:

The facts of this death penalty case are amply set forth in the Florida Supreme Court's opinion on defendant Agan's direct appeal. Agan v. State, 445 So.2d 326 (Fla. 1983). The procedural history has been adequately set out in the district court

opinion denying Agan habeas relief, a stay of execution, and a certificate of probable cause. Agan v. Dugger, slip op. (M.D.Fla. June 24, 1987).

Of the numerous issues raised by Agan in his appeal to this Court, we need only address Agan's claim that he is entitled to an evidentiary hearing with respect to ineffective assistance of counsel in reaching our conclusion that a certificate of probable cause must issue in this case. We note that no court, state or federal, has afforded Agan an evidentiary hearing on this matter.

Agan's proffer of evidence suggests that his trial attorney spent a total of only 15 hours working on the case. Those 15 hours include time the attorney spent for investigation, at the guilty plea hearing, and at the sentencing hearing. Agan claims that his attorney conducted

little or no investigation either for the guilt or sentencing phase of his case. The proffer further suggests that any adequate investigation would have disclosed substantial exculpatory evidence, including the following: that Agan had a significant history of mental problems, had been diagnosed at one or more times as psychotic and as a paranoid schizophrenic, had been taking medicine for psychosis at times crucial to the facts of this case, and, in recent opinion of one Dr. Fox, was incompetent to stand trial at the time of the plea and sentencing hearing; that one of the prison officials who investigated the murder had a question as to whether Agan was the killer; that one or more inmates had pointed to someone other than Agan as the killer; and that one or more inmates had seen this other person leaving the area of the murder at about the crucial

time. Furthermore, the proffer offers some evidence to suggest the possibility that Agan, for some reason-perhaps attributable to his mental problems-confessed, although innocent, and possibly was induced in this regard and coached by other inmates, possibly with the cooperation of prison officials.

Both the state courts and the district court discounted the foregoing proffer, holding that Agan's plea of guilty and detailed confession made any such evidence irrelevant. That perspective overlooks the fact that the proffered evidence of mental problems is highly relevant to Agan's competence to stand trial and to the validity of the guilty plea itself. Moreover, all of the foregoing evidence would have been highly relevant at sentencing, even if the guilty plea itself were valid.

We conclude that Agan has made a "'substantial showing of the denial of [a] federal right'" and that the issue is '"debatable among jurists of reason.'" Barefoot v. Estelle, 463 U.S. 880, 893 and n. 4, 103 S.Ct. 3383, 3394 and n. 4, 77 L.Ed.2d 1090 (1983) (citations omitted). Thus, we hold that a certificate of probable cause must issue. The execution is stayed until further order of this court. "[A] court of appeals, where necessary to prevent the case from becoming moot by the petitioner's execution, should grant a stay of execution pending disposition of an appeal when a condemned prisoner obtains a certificate of probable cause on his initial habeas appeal". Barefoot, 463 U.S. at 893-94, 103 S.Ct. at 3395. The Clerk is directed to issue immediately the briefing schedule.

Agan's motion for a certificate of

probable cause is GRANTED.

Agan's motion for a stay of exectuion is GRANTED UNTIL FURTHER ORDER.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JAMES C. AGAN,

Petitioner,

v. No. 87-489-Civ-J-16

RICHARD DUGGER,
Secretary, Florida
Department of Corrections,

Respondent.

OPINION AND ORDER

The above-styled cause is before the Court on the Petition for Writ of Habeas Corpus by Person in State Custody, filed on June 22, 1987 at 8:42 a.m. by James C. Agan, a death row inmate at Florida State Prison. Respondent filed a Response and Motion to Dismiss on June 23, 1987 at 9:17 a.m. in response to the petition.

After a careful and thorough review of the record in this cause and the pleadings

and memoranda filed herein, the Court concludes that the Petition for Writ of Habeas Corpus should be denied.

Procedural History

Petitioner was indicted for and pled guilty to the murder of Dana DeWitt. The murder took place on September 19, 1980, in the Florida State Prison where both Petitioner and the victim were inmates. Defendant was convicted in the Circuit Court of the Eighth Judicial Circuit, in and for Bradford County, Florida, of first-degree murder on November 24, 1980. That same day at the same proceeding, Petitioner, having waived a jury's rendition of an advisory sentence, was sentenced to death. Petitioner's conviction and sentence were affirmed on direct appeal to the Florida Supreme Court. Agan v. State, 445 So.2d 326 (Fla. 1983), cert. denied, 469 U.S. 873 (1984) ("Agan I").

In February of 1985, the Governor of Florida signed a warrant for the execution of the sentence, setting the execution for the week of March 13-20, 1985. Petitioner, who was not formally represented by counsel at the time, filed an application for a stay of execution on March 15, 1985 with the Circuit Court in Bradford County. Simultaneously therewith, he filed a motion for post-conviction relief pursuant to Rule 3.850, Fla.R.Crim.P.. The circuit court granted a temporary stay of execution to allow Petitioner time to obtain counsel to assist him in seeking post-conviction relief. The State of Florida sought review of the circuit court's action and moved to vacate the stay by means of a writ of prohibition. The Florida Supreme Court denied the State's request. State v. Green, 466 So.2d 218; In re Agan, 466 So.2d 217 (Fla. 1985). After counsel was

appointed, the death warrant expired and the post-conviction proceeding went forward with the final outcome being a denial of relief by the trial court. The Florida Supreme Court thereafter affirmed the denial of post-conviction relief. Agan v. State, 503 So.2d 1254 (Fla. 1987) ("Agan II").

On April 21, 1987, the Governor of Florida signed a second death warrant in Petitioner's case, designating the execution for the week beginning noon, Wednesday, June 24, 1987, and ending noon, Wednesday, July 1, 1987, in accordance with Fla.Stat. §922.11. The Superintendent of the Florida State Prison has set the execution for commencement at 7:00 a.m., Thursday, June 25, 1987.

The Florida Supreme Court had not yet issued its mandate at the time Petitioner's second death warrant was signed.

Petitioner timely filed a motion to stay issuance of the mandate so that a petition for certiorari could be filed in the United States Supreme Court. The Florida Supreme Court denied the requested stay of mandate on April 27, 1987, and the mandate issued May 5, 1987. Petitioner filed in the Florida Supreme Court on May 21, 1987 a Petition for Extraordinary Relief, for a Writ of Habeas Corpus, Request for Stay of Execution and Application for Stay of Execution Pending Disposition of Petition for Writ of Certiorari. The Florida Supreme Court denied both the petition for writ of habeas corpus and the application for stay of execution by a per curiam decision issued on June 8, 1987. Agan v. Dugger, No. 70,589 (Fla., June 8, 1987) ("Agan III"). Another application for stay of execution was filed in and denied by the Florida Supreme Court on June 15, 1987.

Petitioner then filed on June 16, 1987 in the United States Supreme Court an application for stay of execution pending filing and disposition of petition for writ of certiorari, which application was denied on June 18, 1987.

The instant petition is Agan's first prayer for federal habeas corpus relief. The Court will address Petitioner's claims seriatim.

Procedural Default Bar

Before addressing Petitioner's claims, the Court notes that Respondent raises the procedural default bar of Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977), in response to several of the claims presented to this Court. Although not raised on direct appeal, the claims to which Respondent seeks to apply the Wainwright bar were raised in Petitioner's 3.850 motion, and on appeal of the denial

of that motion to the Florida Supreme Court. Review of the Florida Supreme Court's opinion in Agan II reveals that the court did address the procedural default issue, but nevertheless appeared to go on to address the merits of these various claims. 503 So.2d at 1256. As such, under the well established rule that when the State court decided an issue on the merits, federal review is not barred, the Court concludes that Petitioner's claims are not barred. See Oliver v. Wainwright, 795 F.2d 1524, 1528-29 (11th Cir. 1986); Campbell v. Wainwright, 738 F.2d 1573, 1576-77 (11th Cir. 1984), cert. denied, _____ U.S. _____, 106 S.Ct. 1652 (1986).

Review of the relevant pleadings in the record also reveals that Petitioner has exhausted all of the claims raised in the instant petition.

Claims for Relief

Petitioner's first claim for relief is that his pretrial and trial counsel were ineffective in their representation of Petitioner in violation of his constitutional rights. Specifically, Petitioner contends that his pretrial and trial counsel were ineffective for failing to:

(a) investigate the law and facts;

(b) interview witnesses about the crime;

(c) interview family members;

(d) file proper pretrial motions;

(e) correct procedural errors committed by the State and the trial court;

(f) check Mr. Agan's criminal record, or speak with people outside of prison who knew him;

(g) obtain psychiatric and psychological reports containing diagnoses and listing treatment of Petitioner;

(h) properly review Petitioner's prison records at Florida State Prison.

Petitioner first raised this claim before the State courts in his motion for post-conviction relief pursuant to Rule 3.850, Fla.R.Crim.P.. The Florida Supreme Court affirmed the trial court's denial of this claim on the merits, as well as Petitioner's request for an evidentiary hearing on the claim, noting that Petitioner effectively precluded the need for any sort of investigation into the matters raised herein by pleading guilty and forbidding his counsel to make any kind of presentation in mitigation at the sentencing phase. Agan II, 503 So.2d at 1256.

To establish a denial of his constitutional right to the effective assistance of counsel, Petitioner must establish that counsel made errors serious

enough to render his overall performance unconstitutionally deficient, and that such errors prejudiced Petitioner. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). The proper measure of attorney performance is an objective standard of reasonableness under prevailing professional norms. To prove the requisite prejudice, Petitioner must establish a reasonable probability that the result of his trial would have been different had counsel not made the unprofessional errors. See id. at 687-88, 104 S.Ct. 1064-65.

A review of the record reveals that, even if Petitioner's counsel's failure to investigate is considered to fall below the standard of reasonableness under prevailing professional norms, cf. Thompson v. Wainwright, 787 F.2d 1447, 1449-52 (11th cir. 1986), Petitioner has not shown that

the result of the proceeding would have been different. See Tucker v. Kemp, 776 F.2d 1487 (11th Cir. 1985), cert. denied, _____ U.S. _____, 106 S.Ct. 1476 (1986).

Petitioner now suggests that had pretrial and trial counsel undertaken reasonable and proper investigations into the crucial aspects of Petitioner's defense listed above, they would have given advice that would have changed the result. This argument in effect asks the Court to completely ignore the conscious and deliberate choices made by Petitioner during his criminal proceedings. The Court notes that Petitioner almost immediately confessed to the crime to prison officials. Thereafter, he made statements about the murder on several occasions, and also confessed before the grand jury, all against the advice of counsel. Petitioner

then waived a jury trial and pled guilty to first-degree murder in the circuit court, again against the advice of counsel. Moreover, at that same proceeding, Petitioner sought to prevent any presentation in mitigation from being made.

These acts and choices by Petitioner were all part of a deliberate strategy, however ill-advised, to avoid receiving the death penalty. Petitioner stated a number of times that the main reason he was pleading guilty was to ensure that he would receive a life sentence. His strategy was carried out consistently from the time he first confessed to the crime until the imposition of sentence. His directions to counsel and intentional thwarting of their efforts to advise him in aid of his defense all were part of his strategy. Petitioner cannot now be heard to complain that his counsel was ineffective for "allowing" him

to plead guilty and for failing to present any evidence in mitigation.

Elsewhere in his petition, Petitioner argues that he was incompetent at the time of trial, that his guilty plea was involuntarily made, and that the sentencing proceeding was conducted in an unconstitutional manner. As discussed more fully below, the court finds all of these claims to be without merit. As such, Petitioner cannot argue that his deliberate choices, made even in the face of advice to the contrary, would not have been the same had counsel made more thorough investigations into the facts of the case, Petitioner's competency, and Petitioner's background, as well as the substantive and procedural law relating to his case.

Petitioner's second claim for relief is stated as follows:

> Prosecutorial misconduct rising to the level of a due process violation occurred when the State improperly used the grand jury against Petitioner, incorrectly and incompletely informed the Court and counsel concerning exculpatory evidence and improperly urged the death penalty based on improper considerations, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

This claim was raised in Petitioner's 3.850 motion. The Florida Supreme Court concluded that the first and third aspects of this claim were without merit. Agan II, 503 So.2d at 1256. The second aspect of this claim--the improper withholding of exculpatory evidence--was described as "frivolous". Id. at 1257. The court noted that there is no question of the sufficiency of the evidence of guilt because Petitioner pled guilty, and further, that the trial court made a proper inquiry into the factual basis for the plea. The court also stated that since the

question of what the evidence would have shown had the case gone to trial is simply irrelevant, there was no suppression of evidence by the State. Id. The Court agrees with the Florida Supreme Court's disposition of this claim.

The first aspect of this claim is that the prosecutor improperly used Petitioner's grand jury testimony to convict him and sentence him to death. Petitioner's assertion of illegality is unsupported by any legal authority, however. In any event, the Court notes that both Petitioner and his counsel were given the opportunity at the taking of the plea to object to the use of that grand jury testimony. Petitioner knowingly, intelligently, and voluntarily acknowledged the giving of that testimony, its accuracy and its truthfulness, and declined to object to its entry into the record. Petitioner cannot

now contend that said grand jury testimony was improperly used against him.

The second aspect of the prosecutorial misconduct claim is that the prosecutor wrongfully withheld exculpatory evidence. Evidence withheld by the State is material, as would require reversal of a conviction, only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. See United States v. Bagley, ___ U.S. ____, 105 S.Ct. 3375, 3384 (1985). Here, Petitioner argues that the stipulated evidence was false and misleading inasmuch as it is in conflict with the "evidence" now proffered by Petitioner.

Without deciding the issue of whether the proffered evidence in fact is favorable to Petitioner's cause, the Court concludes that there is no reasonable probability

that the result of the plea and sentencing proceeding would have been different. Petitioner's plea of guilty rendered such information irrelevant. The legality of Petitioner's plea is discussed below.

The third aspect of this claim is that the prosecutor engaged in improper argument at the sentencing phase of the proceeding. Petitioner cites the prosecutor's failure to introduce any evidence, his use of the FBI "rap sheets", his unsubstantiated statements concerning Petitioner's lack of remorse and the existence of another unknown potential victim, and the prosecutor's repeated references to personal belief in support of this claim.

To obtain habeas relief on the grounds that improper prosecutorial comment violated his right to due process, Petitioner must establish that the comments

rendered his trial "fundamentally unfair". Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871 (1974). In addition to showing that the prosecutorial comments were improper, Petitioner must show that he was prejudiced thereby; i.e., that there is a reasonable probability that the outcome of the proceedings would have been different had the improper comments not been made. In making this determination as to prejudice, the Court should not view the improper comments in isolation, but should evaluate the improper comments in the context of the entire proceeding. See Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985), cert. denied, 106 S.Ct. 2258 (1986).

The Court concludes that the prosecutor's comments about which Petitioner complains, when considered alone and in combination, did not render the plea

and sentencing proceeding fundamentally unfair. Petitioner was not prejudiced by those comments. The prosecutor's use of the FBI "rap sheets", and his references thereto, were not improper. This issue is discussed more fully below in connection with the discussion of Petitioner's eighth claim. With respect to the remainder of the prosecutor's comments, the Court notes that Petitioner suffered no prejudice because of them since he made statements to the same effect and admitted as much during his plea colloquy with the trial judge.

Petitioner's third claim is that the trial court erred by failing to require an examination into Petitioner's competence to stand trial, and by failing to require even a presentence investigation. Petitioner further asserts that he was in fact incompetent to stand trial. This claim was denied on the merits by the Florida Supreme

Court in its opinion affirming the denial of Petitioner's 3.850 motion. Agan II, 503 So.2d at 1255-56.

A petitioner may pursue a claim of mental incompetency in a federal habeas corpus proceeding even if he did not raise the issue at trial or on direct appeal. Adams v. Wainwright, 764 F.2d 1356, 1359 (11th Cir. 1985), cert. denied, 106 S.Ct. 834 (1986). The legal test for mental incompetency is whether, at the time of trial and sentencing, the petitioner had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding", and whether he had "a rational as well as factual understanding of the proceedings against him". Adams, 764 F.2d at 1360 quoting Dusky v. United States, 362 U.S. 402, 402, 80 S.Ct. 788, 789 (1960). As a matter of procedural due process, a criminal

defendant is entitled to an evidentiary hearing on his claim of incompetency if he presents clear and convincing evidence to create a real, substantial, and legitimate doubt as to his mental capacity to meaningfully participate and cooperate with counsel. This standard of proof is high. The facts must positively, unequivocally, and clearly generate the legitimate doubt. Adams, 764 F.2d at 1360 (citations omitted).

This same standard applies in determining whether the trial court erred in failing to conduct a competency hearing. Where the evidence before the trial court raises a bona fide doubt as to a defendant's competence to stand trial, the trial court must on its own motion hold a competency hearing. Pate v. Robinson, 383 U.S. 375, 385, 86 S.Ct. 836, 842 (1966).

The Court concludes that Petitioner has not presented clear and convincing evidence to create a real, substantial, and legitimate doubt as to his mental competency to stand trial. Furthermore, Petitioner has not shown that the trial court erred in failing to hold a competency hearing at the time of plea and sentencing.

Petitioner's demeanor at the plea and sentencing proceeding cannot be said to have raised a real, legitimate, and substantial doubt as to his competency at that time. He had no difficulty participating in the plea colloquy, and his responses indicate that he clearly understood the nature and consequences of those proceedings. The trial judge reaffirmed his conclusion that Petitioner was competent to stand trial when he gave his oral ruling denying the 3.850 motion. The Court also notes that Petitioner's

counsel did not claim during those proceedings that Petitioner was in fact incompetent. See Adams, 764 F.2d at 1360.

In support of his competency claims, Petitioner points to his history of mental disorder. Petitioner also submits the June 15, 1987 psychiatric evaluation report of Dr. Robert A. Fox, Jr. While these materials provide some support for Petitioner's claim, the Court concludes that they are not sufficient to raise a real, substantial, and legitimate doubt as to Petitioner's competency at the time of the plea and sentencing proceedings. Petitioner's long psychiatric history reveals problems mostly remote in time to Petitioner's competency at the time of his conviction and sentence. This history is of little direct relevance to Petitioner's state of mind in November, 1980, especially in the face of his rational behavior at

that time. Similarly, the Court discounts the June 15, 1987 psychiatric opinion as being too remote in time to raise sufficient doubt as to Petitioner's competence to stand trial at the time of the plea and sentencing proceeding. Moreover, the very same conduct that Dr. Fox now characterizes as bizarre consisted of intentional acts by Petitioner in furtherance of his strategy to avoid the death penalty. Petitioner cannot now claim incompetency because his strategy failed.

In light of the Court's disposition of Petitioner's competency claims, the Court concludes that no error occurred when the trial judge failed to order a presentence investigation. The Court notes that Petitioner knowingly, intelligently, and voluntarily waived his right to such an investigation at the plea and sentencing proceeding.

Petitioner's fourth claim is that his plea of guilty was not knowingly, intelligently, and voluntarily entered. He bases this claim primarily on the arguments that he received ineffective assistance of counsel and that he was incompetent at the time he pled guilty. The Florida Supreme Court appeared to address this claim on the merits in its opinion denying Petitioner's motion for post-conviction relief. Agan II, 503 So.2d at 1256.

To the extent Petitioner relies on his ineffective assistance and incompetency claims, which the Court has already found to be without merit, to support his involuntary plea claim, said claim is denied for the reasons already stated. Furthermore, a review of the transcript of the plea and sentencing proceeding reveals that the plea colloquy was thoroughly undertaken, and that Petitioner knowingly,

intelligently, and voluntarily entered his plea of guilty.

Petitioner's fifth claim is that he was sentenced to death and convicted based exclusively on his own "admissions". Petitioner complains that he was never informed that the statements he was making during the taking of the plea, and that he had previously made to the grand jury, would be used against him to establish aggravating circumstances leading to the imposition of the death sentence. The Florida Supreme Court found this claim to be without merit. See Agan II, 503 So.2d at 1256.

The Court already has determined that Petitioner was competent at the time of trial and that Petitioner's plea of guilty and his statements and admissions during the plea and sentencing proceeding were knowingly, intelligently, and voluntarily

made. As noted by the Florida Supreme Court, Petitioner's own actions, relieving the State of the burden of proving aggravating circumstances by competent evidence, by admitting their existence, did not render the plea and sentencing proceedings illegal. Moreover, the record clearly shows that Petitioner knew and understood that he was facing a possible death sentence. His stated belief that he would receive a life sentence because he was pleading guilty merely highlights his adherence to his strategic decision. It does not show that he did not understand the proceedings. Indeed, Petitioner had been down this same road before.

Petitioner's sixth claim is that the trial court improperly sentenced Petitioner to death based upon an aggravating circumstance not found by the trial court at the sentencing proceeding in violation

of his due process rights. Petitioner points to the fact that during the oral pronouncement of sentence, the trial judge found the following aggravating circumstances: "that the murder was done in a cold and calculating manner and that you were serving a term of imprisonment for murder at that time". Yet, in the written Judgment and Sentence, entered November 24, 1980, the trial judge wrote that the following statutory aggravating factors applied:

1. The Defendant was under sentence of imprisonment--for murder--when the crime was committed.

2. The Defendant had previously been convicted of First Degree Murder and of Robbery.

The Florida Supreme Court denied the claim on the merits. 503 So.2d at 1256.

The Court concludes that this claim is without merit. Petitioner admitted, and the State Attorney emphasized in his argument, the facts which formed the basis for finding the applicability of the two statutory aggravating factors contained in the written Judgment and Sentence. More significantly, the trial court did expressly make the finding during the oral pronouncement of sentence that Petitioner was "serving a term of imprisonment for murder at the time". Although it may be inferred from this statement that the trial court correctly found that "serving a term of imprisonment for murder at the time" constituted only one statutory aggravating factor, this error is of no consequence. Petitioner was sentenced to death based on the presence of two statutory aggravating factors and the non-existence of any statutory or non-statutory mitigating

factors. The legality of finding two separate aggravating factors from the fact that Petitioner was in prison for murder at the time he committed the murder sub judice is unassailable. (See discussion of Petitioner's thirteenth claim, infra).

Petitioner's seventh claim is that the trial court erred by finding guilt and imposing death without taking any live testimony and by not explaining to Petitioner what a stipulation is and what its effect is. This, Petitioner claims, was in violation of this Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Claim seven was addressed by the Florida Supreme Court in Agan II, 503 So.2d at 1256.

Petitioner argues that the trial court improperly used stipulated facts without explaining the ramifications of such stipulations to Petitioner. The trial

record, however, indicates that the court did question Petitioner's understanding of the proceeding. "The suggestion that there should have been detailed instruction to [Petitioner] by the court on the nature and consequences of the factual stipulations he made is completely without merit . . . Indeed the record conclusively shows that [Petitioner] knew he was facing a possible death sentence". Agan II, 503 So.2d at 1256.

This Court agrees with the findings of the Supreme Court of Florida that this claim is without merit, and denies Petitioner's seventh claim.

The eighth claim is that the State offered no evidence to prove aggravating circumstances, and none were proved beyond a reasonable doubt. Thus, Petitioner claims, the death sentence is invalid under the Eighth and Fourteenth Amendments.

Petitioner raised claim eight in his motion for post-conviction relief, and the Florida Supreme Court affirmed the denial of that claim. Agan II. 503 So.2d at 1256.

The aggravating circumstances that the trial court found in sentencing Petitioner to death were that Petitioner was serving a term of imprisonment at the time of the offense, and that Petitioner had previously been convicted of first-degree murder and of robbery. Both of these facts were based on an FBI "rap sheet" that Petitioner told the court was, in fact, his record. Because Petitioner admitted that this evidence existed and was true, the State's burden of proving such evidence was relieved. Petitioner's argument that, even though he admitted the truth of these aggravating circumstances, the State had to independently prove this evidence is completely without merit.

Claim nine of the petition before this Court is that the sentencing hearing was conducted illegally, and Petitioner's resulting death sentence violates the Eighth and Fourteenth Amendments. The Florida Supreme Court ruled on the merits of this claim in Agan II, 503 So.2d at 1256.

Petitioner claims that the use of his grand jury testimony, and the use of his FBI "rap sheet" as evidence of statutory aggravating circumstances at his sentencing hearing was illegal. As has been previously explained, the use of Petitioner's "rap sheet" to present evidence of prior crimes of violence was legitimate.

Petitioner fails to show how or why the use of his grand jury testimony was illegal. The testimony was originally introduced at the plea and sentencing

proceeding to establish a factual basis for the guilty plea. However, the trial court did no rely on this testimony alone. The trial judge repeatedly asked Petitioner if the facts that the State was presenting were accurate, and if he had any disagreements with the facts. Repeatedly, Petitioner admitted the truth of his grand jury testimony, and also admitted the truth of the facts presented by the State. Petitioner admitted these facts freely and voluntarily. The claim that the court had an obligation to ask Petitioner if these admitted facts could be used against him is meritless.

Claim ten is that the trial court erroneously considered an FBI "rap sheet" in aggravation of Petitioner's sentence. This claim is redundant to claim eight and is denied for the same reasons.

The eleventh claim of this petition is that Petitioner was denied of meaningful and individualized capital sentencing proceeding in violation of the Sixth, Eighth and Fourteenth Amendments. Specifically, Petitioner claims that the trial court erred because it did not consider any non-statutory mitigating circumstances in its determination of the sentence. Lockett v. Ohio, 438 U.S. 586 (1978). This claim was raised on direct appeal of Petitioner's sentence. The Supreme Court of Florida found that "the trial judge did consider and reject [Petitioner's] willingness to cooperate as a mitigating circumstance by finding that [Petitioner] was not remorseful, but was rather seeking a chance to kill again". Agan I, 445 So.2d at 329.

The day after the death warrant for Agan was signed, the United States Supreme

Court decided Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). The Hitchcock Court held that if the evidence is clear that the sentencer limited consideration of mitigating circumstances to those enumerated in the statute, the sentencing proceeding is in violation of the Eighth and Fourteenth Amendments. Hitchcock, 107 S.Ct. at 1924.

In light of Hitchcock, Petitioner filed a petition for writ of habeas corpus with the Florida Supreme Court. The court held that the intervening decision in Hitchcock did not require the court to reexamine the issue of limited consideration of statutory mitigating circumstances. The court concluded that the trial court did consider both statutory and non-statutory mitigating circumstances. Agan v. Dugger, No. 70,589, slip op. at 1-2 (Fla. June 8, 1987).

Unlike Hitchcock, the evidence before this Court does not clearly indicate that the trial judge limited his consideration of mitigating circumstances to those enumerated in the statute.

In Hitchcock, the trial court specifically stated that the mitigating circumstances to consider were those enumerated in the statute. This statement was made despite the argument of counsel that the court should consider evidence about the petitioner's background and capacity for rehabilitation, both being non-statutory mitigating factors. This evidence was not allowed in. In his petition to enter a plea of guilty in the instant case, Petitioner included information that he had an eighth grade education. In addition, at the sentencing hearing, over Petitioner's objection, his attorney argued that prison authorities

shared some of the responsibility for the murder because they released Petitioner back into the prison population in spite of his earlier threats against the victim. These mitigating circumstances are non-statutory, and there is no indication that the trial court did not consider them.

Moreover, this Court finds that by his own actions Petitioner is precluded from arguing that the mitigating circumstances considered were unconstitutionally limited. Petitioner pled guilty against the advice of his attorney. He waived his right to a presentence investigation report despite being told that the report could supply the court with mitigating factors. He waived his right to a jury advisory recommendation as to sentencing. Most important to this Court is that Petitioner would not allow his counsel to argue anything in his defense. Any limitation of

mitigating circumstances was done by Petitioner himself.

The strategy Petitioner used before the trial court backfired. The record is clear, and in fact Petitioner admitted, that his conduct was part of a plan to beat the death sentence; he used a similar strategy and received a death sentence which was subsequently reduced to a life sentence after his first murder conviction. Petitioner refused to supply his attorney or the court with any mitigating factors. To allow him now to argue that his actions caused the trial court to commit reversible error is nothing less than absurd.

Petitioner's twelfth claim is that he received ineffective assistance of appellate counsel. This claim was raised in Petitioner's petition for writ of habeas corpus filed in the Supreme Court of

Florida on May 21, 1987. That court found that Petitioner's lack of cooperation with counsel and his refusal to allow counsel to perform his duties did not render counsel ineffective, but rather excused counsel from such charges.

In considering whether Petitioner has been denied his constitutional right to the effective assistance of appellate counsel, the Court must apply the two-prong test set forth in Strickland v. Washington, supra, discussed above in connection with Petitioner's first claim.

Petitioner's ineffective assistance of appellate counsel claim is based upon appellate counsel's alleged failure to raise on direct appeal issues regarding statements made by Petitioner to the grand jury and during the sentencing proceeding; specifically, claims seven through ten in this petition. As has been discussed,

although these issues were in procedural default, the Florida Supreme Court nonetheless addressed the merits. This Court has concluded that each of these claims is without merit. Petitioner fails to demonstrate that he has suffered any prejudice from the alleged ineffectiveness. Therefore, this Court need not now determine if appellate counsel indeed was ineffective. Tucker, 776 F.2d at 1490 n.8. This claim is denied.

Petitioner's final claim is that the death sentence is an unconstitutional violation of the Eighth and Fourteenth Amendments because it is founded upon improper aggravating circumstances and in the absence of a finding of proper mitigating circumstances. Petitioner raised this issue on direct appeal and the Florida Supreme Court found no errors in the consideration made by the trial court.

Petitioner first argues that the trial court improperly found as two aggravating circumstances that Petitioner was serving a sentence and that he had been convicted previously of first-degree murder. Section 921.141(5)(a), Fla.Stat. (1979), lists as an aggravating circumstance a present sentence of imprisonment, and Section 921.141(5)(b), Fla.Stat. (1979), lists a prior conviction of another capital felony. When the instant offense occurred, Petitioner was serving a life sentence for first-degree murder. Petitioner argues that the trial court gave improper double consideration to a single circumstance, and should have considered it as one aggravating circumstance.

Petitioner's argument is not applicable in this case. The previous conviction for a capital offense and the present sentence of imprisonment are "two separate and

distinct characteristics" of Petitioner. These two findings are "not based on the same evidence and the same essential facts". Waterhouse v. State, 429 So.2d 301, 307 (Fla. 1983). The trial court's finding of two aggravating circumstances was proper.

Petitioner next argues that the trial court improperly found lack of remorse as an aggravating circumstance. Lack of remorse cannot constitute an aggravating circumstance. Pope v. State, 441 So.2d 1073 (Fla. 1983). This Court agrees with the finding of the Florida Supreme Court, however. The Florida Supreme Court found that the trial court did not use this evidence in aggravation of the sentence, but rather used it to negate the arguments for mitigation on the ground of mental or emotional disturbance and on the ground of Petitioner's prompt confession and plea of

guilty. Agan I, 445 So.2d at 328. This limited consideration of the absence of remorse for the crime is not erroneous.

Petitioner does not allege facts which, if proved, would entitle him to relief. Therefore, an evidentiary hearing in federal court on any of the claims raised herein is not required. See generally Townsend v. Sain, 372 U.S. 293, 312-13 (1963).

Accordingly, the Court now

ORDERS and ADJUDGES:

1. That Petitioner's request for a de novo evidentiary hearing be and the same is hereby DENIED.

2. That the Petition for Writ of Habeas Corpus by Person in State Custody, filed herein on June 22, 1987, be and the same is hereby DENIED.

3. That the Clerk of the Court is hereby directed to enter Final Judgment dismissing this case.

4. That the Clerk of the Court shall give immediate telephonic and telegraphic notice of the entry of this Order, and its contents, to the attorneys of record and to the Respondent, individually.

DONE and ORDERED in Chambers at Jacksonville, Florida this 24th day of June, 1987, at 12:43 p.m.

/s/ John H. Moore, II
U.S. DISTRICT JUDGE

Copies to:

SUPREME COURT OF FLORIDA

No. 70,589

JAMES AGAN, Petitioner,

vs.

RICHARD DUGGER, Respondent.

[June 8, 1987]

PER CURIAM

James Agan, under death warrant, petitions this Court for a writ of habeas corpus and a stay of execution. We have jurisdiction pursuant to article V, section 3(b)(9) of the Florida Constitution, and for the reasons which follow, we deny both the stay and the writ.

This is the third appearance by Mr. Agan before this Court, and both parties have waived oral argument in this matter. The facts of this case are sufficiently set

forth in the two previous opinions by this Court.*

Mr. Agan presents two claims in this petition. The first involves the alleged failure of the sentencing judge to expressly consider nonstatutory mitigating circumstances in imposing the sentence of death. Initially, it should be noted that this issue was raised by Agan at his direct appeal. The intervening United States Supreme Court decision in Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), does not require us to reexamine that issue as it presents no new issues of law as to this case. Moreover, we have disposed of this issue adverse to Agan in his previous

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* The previous opinions are reported as: Agan v. State, 445 So.2d 326 (Fla. 1984), cert. denied, 469 U.S. 873 (1984) (Agan I); Agan v. State, 503 So.2d 1254 (Fla. 1987) (Agan II).

appeal to this Court. We have already held, in Agan I, that it is clear from the record the trial judge did consider both statutory and nonstatutory mitigating factors.

The second issue raised by Agan concerns the charge that his appellate counsel provided ineffective assistance during the course of his initial appeal. This claim, based on the alleged failure to raise issues regarding statements made by Agan to the grand jury and during the sentencing proceeding, presents no new issues in light of Agan's persistent desire to go on record as having committed the murder, and willing to return to the prison population in order to kill again. Counsel's failure to allege the inadmissibility of these statements could not be called ineffective due to Agan's repeated willingness to confess to both the

crime, and the desire to repeat the crime. Agan's lack of cooperation with counsel, and his refusal to allow his counsel to perform his duties does not render counsel ineffective. Rather, it serves to excuse counsel from such charges.

We deny the stay of execution as well as the writ of habeas corpus.

It is so ordered.

McDONALD, C.J., and OVERTON, EHRLICH, SHAW, BARKETT, GRIMES and KOGAN, JJ., Concur

NO MOTION FOR REHEARING WILL BE ALLOWED.

Original Proceeding - Habeas Corpus

Larry Helm Spalding, Capital Collateral Representative and Mark E. Olive, Litigation Director, Office of the Capital Collateral Representative, Tallahassee, Florida,

for Petitioner,

Robert A. Butterworth, Attorney General and Mark C. Menser, Assistant Attorney General, Tallahassee, Florida,

for Respondent.

SUPREME COURT OF FLORIDA

No. 67, 831

JAMES AGAN, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[February 5, 1987]

PER CURIAM

This is an appeal from the order of the circuit court denying, without an evidentiary hearing, James Agan's motion to vacate judgment and sentence filed under Florida Rule of Criminal Procedure 3.850. Jurisdiction of the appeal lies with this Court because appellant was previously convicted of first-degree murder and sentenced to death and his appeal was decided in this Court. Art. V, § 3(b)(1), Fla.Const.

On the previous appeal, this Court affirmed appellant's conviction and sentence of death. Agan v. State, 445 So.2d 326 (Fla. 1983), cert. denied, 469 U.S. 873 (1984). In February of 1985, the Governor of Florida signed a warrant for the execution of the sentence setting the execution for the week of March 13-20, 1985. Thereafter, Circuit Judge R.A. Green of the Eighth Judicial Circuit granted a temporary stay ot execution to allow Agan time to obtain counsel to assist him in seeking post-conviction relief. The State of Florida sought review of the circuit judge's action and moved to vacate the stay by means of a petition for writ of prohibition. State v. Green; In re Agan, 466 So.2d 217, 218 (Fla. 1985). After counsel was appointed, the death warrant expired and the post-conviction proceeding went forward with the final outcome being a

denial of relief, the appeal of which is before us now.

Appellant's adjudication of guilt of first-degree murder was based upon his plea of guilty to the charge. After being adjudged guilty, appellant waived the right to have a jury hear evidence and make a sentencing recommendation. Agan v. State, 445 So.2d at 327, 328.

Appellant presents the following arguments. (1) He argues that his plea of guilty and waiver of rights were invalid because he was incompetent to make them. He argues that the court below should have held an evidentiary hearing on these allegations. (2) Appellant contends that he received ineffective assistance of counsel before and at the time of his waivers of rights and plea of guilty, and that the court below should have held an evidentiary hearing on this point. (3)

Appellant argues that the proceedings held when his plea of guilty was tendered and in determining his sentence were improper and that his statements were improperly used against him in these proceedings. (4) Appellant argues that at the time he tendered his plea of guilty, the state had exculpatory evidence in its possession that should have been provided to the trial court and defense counsel. We find all of these contentions to be without merit and so affirm the denial of post-conviction relief.

On his first point appellant asserts that he was not competent to enter a plea and that the trial court at the time the guilty plea was entered should have ordered expert evaluation of his competency. Appellant relies heavily on the decisions of the United States Supreme Court in Drope v. Missouri, 420 U.S. 162 (1975); Pate v.

Robinson, 383 U.S. 375 (1966); and Dusky v. United States, 362 U.S. 402 (1960), and this Court's decision in Hill v. State, 473 So.2d 1253 (Fla. 1985). The principle of law stated by these decisions is that a trial court, on its own motion, must order inquiry into the defendant's mental competence to stand trial (or, as in this case, to formerly respond to criminal charges) if there is evidence, information, or any showing before the court that raises questions concerning the defendant's competency. Appellant says that his behavior before the trial court did raise questions so there should have been a professional evaluation and hearing on competency. The mere fact, however, that a defendant confesses his guilt, pleads guilty, and disregards the advice of counsel, is not be itself sufficient to raise questions about mental competency.

Appellant in effect argues that there was information available casting doubt on his competency and that the trial court on its own motion should have discovered such information. Appellant's argument would require a competency inquiry in virtually every case in which an accused person makes a decision perceived by others as being unwise.

A motion to vacate judgment may be denied without an evidentiary hearing where the motion and the record of the case conclusively demonstrate that the movant is entitled to no relief. E.g., Lightbourne v. State, 471 So.2d 27 (Fla. 1985). Here the trial judge, who was the same judge who presided at the proceedings when appellant pled guilty and was sentenced, could reasonably and properly have determined that appellant was conclusively shown to be entitled to no relief.

In his second point on appeal appellant argues that during the proceedings in which he pled guilty and was sentenced to death, he received ineffective assistance of counsel. In support of this argument he asserts that his lawyers performed no investigation about the crime or appellant's background. The record of the proceedings shows that, against the advice of counsel, appellant pled guilty thus relieving the state of the burden of proving guilt. An investigation into whether there were doubts about guilt was rendered pointless by the appellant's own act. If appellant had pled not guilty, then there would have been some purpose for an investigation by counsel. Moreover, appellant himself, against the advice of counsel, decided not to make any kind of presentation to the court on the matter of sentencing. We cannot know what evidence

and argument defense counsel would have uncovered and presented had he been authorized by his client to undertake such a course of representation. The appellant himself forbade it. We therefore find that the trial court was correct in denying the motion without a hearing.

Appellant's third argument is that his statements to investigative officers and to the grand jury should not have been used against him and that the plea acceptance proceeding and the sentencing proceeding did not comport with due process principles. Appellant also argues that the aggravating circumstances found in support of the death sentence were based on stipulated facts rather than evidence and appellant was not adequately informed of the meaning and effect of the stipulations. These arguments which could have been raised by objection in the trial

court and presentation to this Court on appeal. Thus they are not cognizable under Rule 3.850. E.g., Raulerson v. State, 462 So.2d 1085 (Fla. 1985). Appellant did not object at trial or dispute any of the state attorney's arguments or statements or the court's findings. As this Court found in deciding the appeal, the trial court questioned appellant extensively about the voluntariness of his plea of guilty and his knowledge of its consequences. The suggestion made now that there should have been detailed instruction to appellant by the court on the nature and consequences of the factual stipulations he made is completely without merit. It is not to be assumed that counsel did not advise his client on these matters. Indeed the record conclusively shows that appellant knew he was facing a possible death sentence. Appellant's own actions, relieving the

state of the burden of proving aggravating circumstances by competent evidence, by admitting their existence, did not deprive the proceeding of all legality as is argued now. The arguments are improper and completely without merit.

Appellant's final argument on appeal--that the state deceived defense counsel and the court into believing and accepting appellant's confessions and plea--if frivolous. There is no question of the sufficiency of evidence of guilt because appellant pled guilty. The court made a proper inquiry into the factual basis for the plea. The question of what the evidence would have showed had the case gone to trial is simply irrelevant. Thus there was no suppression of evidence by the state.

We affirm the denial of the motion for post-conviction relief.

It is so ordered.

McDONALD, C.J., OVERTON, EHRLICH, SHAW and BARKETT, JJ., and ADKINS, J. (Ret.), Concur

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Bradford County,

R.A. Green, Jr., Judge - Case no. 80-312-CF.

Larry Helm Spalding, Capital Collateral Representative and Mark Evan Olive, Litigation Coordinator, Office of the Capital Collateral Representative, Tallahassee, Florida; and Jack A. Goldberger of Atterbury, Goldberger & Richardson, West Palm Beach, Florida,

for Appellant,

Robert A. Butterworth, Jr., Attorney General, and Mark C. Menser and Wallace E. Allbritton, Assistant Attorneys General, Tallahassee, Florida,

for Appellee.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 1, 1984

Mr. Wallace Allbritton
Asst. Attorney General
The Capitol
Tallahassee, FL 32301

Re: James Agan,
v. Florida
No. 83-6699

Dear Mr. Allbritton:

The Court today entered the following order in the above entitled case:

The petition for writ of certiorari is denied. Justice Brennan and Justice Marshall dissenting:

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227, 231 (1976), we

would grant certiorari and vacate the death sentence in this case.

Very truly yours,

Alexander L. Stevas
Clerk

SUPREME COURT OF FLORIDA

No. 60, 476

JAMES AGAN, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[December 15, 1983]

BOYD, J.

This cause is before the Court on appeal of a judgment of conviction of first-degree murder and a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla.Const.

Appellant was indicted for and pled guilty to the murder of Dana DeWitt. The murder took place on September 19, 1980, in the Florida State Prison where both appellant and the victim were inmates. On

the day of the murder, appellant went to prison authorities and confessed to killing his fellow prisoner. Against the advice of court-appointed counsel, appellant testified before the grand jury that examined the evidence in the case. After being formally accused of the crime by indictment, appellant entered a plea of guilty to the charge of first-degree murder. In proceedings held to determine the voluntariness of the plea and the factual basis for it, appellant again testified in detail about the crime. At this hearing on appellant's guilty plea, the court extensively questioned him about his understanding of his constitutional rights, his knowledge of the consequences of pleading guilty, and the voluntariness of his plea. Appellant insisted upon waiving his right to a trial.

Appellant's grand jury and trial court testimony established the following facts. Appellant was a prisoner serving a life sentence without eligibility for parole for twenty-five years, having been convicted of first-degree murder. In prison, appellant was the victim of a robbery perpetrated by Dana DeWitt and another prisoner. Some time afterward, appellant and DeWitt had a fight. Appellant was disciplined for possession of a weapon and was placed in special restrictive confinement for two years. Appellant testified that during his disciplinary confinement he thought a great deal about getting revenge against DeWitt by murdering him.

After appellant's disciplinary confinement was over and he was returned to the general prison population, appellant was assigned to a job in a prison

factory. There he fashioned a piece of metal into a knife using prison factory machinery. He chose a day and a time when he knew that no guards and few prisoners would be in the vicinity of DeWitt's cell. He went there and fatally stabbed DeWitt in the neck.

Appellant told the grand jury that he had confessed to the crime and would plead guilty in hopes of receiving a life sentence so that he could return to prison and murder the other prisoner who had robbed him years earlier. Subsequently, he reiterated before the court that in pleading guilty he hoped to get a life sentence so that he could return to prison and kill again.

In further support of a factual basis for the plea, the state submitted a transcript of the grand jury proceeding and the result of the autopsy showing that DeWitt died from a stab wound in his neck.

After accepting the plea of guilty, the court proceeded to the sentencing phase of the trial. Appellant waived the right to have a jury hear the evidence and submit an advisory sentencing verdict. The state presented evidence showing that at the time of the murder, appellant was serving a sentence for another first-degree murder. Appellant declined to present any evidence in mitigation. After hearing arguments from both sides, the trial judge found that the murder was committed in a cold and calculating manner and that appellant was serving a term of imprisonment for murder at the time and sentenced appellant to death. In his written findings in support of the death penalty, however, the judge failed to mention the aggravating circumstance of the murder being committed in a cold and calculated manner. Instead he wrote:

> The question of penalty was addressed. The Court finds the following aggravating factors apply in this case:
> 1. The Defendant was under sentence of imprisonment--for murder--when this crime was committed.
> 2. The Defendant had previously been convicted of First Degree Murder and Robbery.
> There are no other applicable statutory aggravating factors.
> There are no applicable statutory mitigating factors. The record shows this was a merciless revenge killing; planned over a period of two years; coldly executed and cruel. The Defendant shows no remorse but seeks rather a chance to kill again.

In this appeal Agan raises four issues concerning the propriety of the death sentence. His first argument is that the trial court improperly found as two separate aggravating circumstances that he was under sentence of imprisonment and that he had previously been convicted of a crime involving violence. However, where these two aggravating factors are not based on the same essential feature of the crime or

of the offender's character, they can be given separate consideration. Waterhouse v. State, 429 So.2d 301 (Fla. 1983).

Appellant's second argument is that the trial court improperly considered lack of remorse as an aggravating circumstance. This Court recently held that lack of remorse may not be considered as an aggravating circumstance or in enhancement of a proper statutory aggravating circumstance. Pope v. State, No. 62,064 (Fla. Oct. 27, 1983). However, as the above-quoted findings indicate, the trial court mentioned lack of remorse not in connection with aggravating factors but rather in connection with the finding that there were no mitigating circumstances. The judge referred to the absence of remorse in support of his rejection of defense counsel's arguments for mitigation on the ground of mental or emotional

disturbance and on the ground of appellant's prompt confession and plea of guilty. Thus the evidence was used not in aggravation but only to negate mitigation. There was no error in this limited consideration of the absence of remorse for his crime on the part of appellant.

Next appellant argues that the trial court erred in not considering his age, 54, as a mitigating circumstance. This mitigating circumstance usually applies to those youthful in age because of society's responsibility for overseeing the welfare of the young. Since society also has the responsibility of protecting those suffering from the infirmities of aging, see In re Byrne, 402 So.2d 383 (Fla. 1981), appeal dismissed, 455 U.S. 1009 (1982), this mitigating circumstance may also be applied to older persons. However, we do

not find that at the time of the crime appellant had reached an age requiring special consideration. We therefore find no error in not finding his age to be a mitigating circumstance.

Finally, appellant argues that the trial court erred by failing to consider any non-statutory mitigating circumstances. Appellant claims that his willingness to cooperate by confessing, appearing before the grand jury, and pleading guilty should have been considered as a mitigating circumstance. See Washington v. State, 362 So.2d 658 (Fla. 1975), cert. denied, 441 U.S. 937 (1979). As was stated above, however, it is apparent that the trial judge did consider and reject this willingness to cooperate as a mitigating circumstance by finding that Agan was not remorseful, but was rather seeking a chance to kill again. No

evidence was offered or arguments made as to the applicability of any other non-statutory mitigating factors. Thus we conclude that the trial court did consider all the non-statutory mitigating factors there were to be considered.

Having found no errors, we affirm the conviction of first-degree murder and the sentence of death.

It is so ordered.

ALDERMAN, C.J., ADKINS, OVERTON, McDONALD and EHRLICH, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An appeal from the Circuit Court in and for Bradford County,

R.A. Green, Jr., Judge - Case No. 80-312-CF

P. Douglas Brinkmeyer, Assistant Public Defender, Second Judicial Circuit, Tallahassee, Florida,

for Appellant,

Jim Smith, Attorney General and Wallace E. Allbritton, Assistant Attorney General, Tallahassee, Florida,

for Appellee.

IN THE CIRCUIT COURT OF FLORIDA, EIGHTH JUDICIAL CIRCUIT, IN AND FOR BRADFORD COUNTY.

CASE NO. 80-312-CF

STATE OF FLORIDA,

VS.

JAMES AGAN

JUDGMENT AND SENTENCE

The Defendant, JAMES AGAN, is an inmate at the Florida State Prison at Starke serving a sentence for First Degree Murder. Dana DeWitt was also an inmate at Florida State Prison. After two years of premeditation, JAMES AGAN killed Dana DeWitt by stabbing him with a knife.

Over advice of counsel, JAMES AGAN appeared before the Grand Jury which later indicted him. His remarks were reported and are attached.

Agan, over advice of counsel, JAMES AGAN tendered a plea of guilty as charged. The transcript of the proceeding (attached) justifies the finding that the plea was tendered voluntarily, and with full knowledge of rights and possible consequences thereof.

The question of penalty was addressed. The Court finds the following statutory aggravating factors apply in this case:

1. The Defendant was under sentence of imprisonment--for murder--when this crime was committed.

2. The Defendant had previously been convicted of First Degree Murder and of Robbery.

There are no other applicable statutory aggravating factors.

There are no applicable statutory mitigating factors. The record shows this

was a merciless revenge killing; planned over a period of two years; coldly executed and cruel. The Defendant shows no remorse but seeks another chance to kill again.

Upon being asked in Open Court if the Defendant has any cause to show why the sentence of the law should not be pronounced, and having said nothing sufficient,

IT IS THE JUDGMENT AND SENTENCE OF THIS COURT THAT:

YOU, JAMES AGAN, BE SENTENCED TO DEATH IN THE ELECTRIC CHAIR. IT IS THE ORDER, JUDGMENT AND SENTENCE OF THIS COURT THAT YOU BE KEPT BY THE PROPER AUTHORITIES AT THE FLORIDA STATE PRISON IN CLOSE CONFINEMENT UNTIL THE DATE OF YOUR EXECUTION IS SET, THAT SUCH DAY YOU SHALL BE PUT TO DEATH BY HAVING ELECTRICAL CURRENTS PASS THROUGH YOUR BODY IN SUCH AMOUNTS AND FREQUENCY UNTIL YOU ARE RENDERED DEAD.

That at the request of the Defendant, an Order of Insolvency and Appointment of Counsel for purposes of appeal has been entered in this case for purposes of perfecting an appeal to the Florida Supreme Court.

DONE and ORDERED in Open Court at Starke, Bradford County, this 24th day of November, A.D. 1980.

/s/ R.A. Green, Jr.
CIRCUIT JUDGE